BOONSOM BOONYANIT

v.

ADORNA PROPERTIES SDN. BHD. (1)

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. 24-554-89]
7 DECEMBER 1989

LAND LAW: *Registrar's Caveat - Whether order was mandatory or prohibitory in nature - Whether interlocutory mandatory injunction should have been granted - Indefeasibility of title - National Land Code, ss. 320, 340, 417 - Government Proceedings Ordinance 1956 - Section 29.*

The applicant, B, a Thai national, is a widower of STH (the deceased) who owned land in Penang. On 12 July 1989, someone had impersonated B with forged documents to dispose the deceased's land. A police report was duly lodged concerning the fraudulent sale of the said land. B, through her Counsel, had filed an *ex parte* application for entry of a Registrar's Caveat under s. 320 of the National Land Code (the NLC) and the order was granted on 14 July 1989. On 9 September 1989, the respondent A applied to intervene. On 30 October 1989 the Court heard arguments in respect of the application. A said that they had become the registered owner of the land on 24 May 1989 and that by virtue of s. 340 of the Code they had good title until proven otherwise. As A had developed the land, the Registrar's Caveat would prevent A from continuing with the project, thereby resulting in considerable loss and damage. A also said that B had failed to make a full disclosure of the material facts of the case. A further submitted that the order, being mandatory in nature, should never have been granted and should be removed because it contravened s. 29(1) of the Government Proceedings Ordinance 1956 (the Ordinance).

Held:

[1] The contention by the respondent that the order contravened s. 29(1) of the Ordinance is without merit as in the present proceedings, neither the Government nor the Registrar of Titles, Penang is made a party.

[2] The *ex parte* order, being one of great urgency, was properly made; any delay would have caused the applicant great hardship and would entail irreparable damage to the respondent.

[3] The failure of the applicant's Counsel to make proper enquiries at the Land Registry regarding the ownership of the said land cannot invalidate her affidavit and does not outweigh the urgency of the application.

[4] The important consideration was not whether the injunction was mandatory or prohibitory; but whether the injustice suffered by the defendant if the injunction was granted and the plaintiff later failed at the trial was greater than the injustice to the plaintiff if the injunction was not granted and she later succeeded at the trial.

[5] On the facts, the risk of injustice to the applicant is greater and therefore on the balance of convenience, the order was properly made.

[6] On the question whether the Registrar's Caveat was properly made, notwithstanding the fact that the Registrar of Titles was not made a party to the application, the Court has power to order the Registrar to enter the Registrar's Caveat under s. 417(1) of the NLC.

[Respondent's application dismissed.]

Cases referred to:
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44
Seet Soh Ngoh v. Venkateswara Sdn. Bhd. & Anor. [1976] 1 MLJ 242
AR. PL. Palaniappa Chettiar v. PL. AR. Letchumanan Chettiar & Anor. [1972] 1 MLJ 232
Films Rover International Ltd. v. Cannon Film Sales Ltd. [1987] 1 WLR 670

Legislation referred to:
Government Proceedings Ordinance 1956, s. 29(1)
National Land Code 1965, ss. 320(1), 340, 417(1)

For the applicant - Gerard Chan Weng Yew; M/s. Lim Kean Siew & Co.
For the respondent - Ghazi Ishak & Lim Chien Cheng; M/s. Presgrave & Matthews

[Editor's Note: On appeal to the Supreme Court, which was heard on 29 August 1990, the appeal was dismissed.]

JUDGMENT

Mohamed Dzaiddin J:

This is an application on the part of the respondent asking the Court to set aside the order dated 14 July 1989 ("the said order") restraining the Registrar of Titles, Penang from registering any instrument of dealing and directing the entry of the Registrar's Caveat pursuant to s. 320 National Land Code in respect of land known as Lots 3606 and 3607 Bandar Tanjong Bungah, Mukim 18, Pulau Pinang ("the said land").

On 14 July 1989, upon an *ex parte* application by the applicant, I granted the abovementioned order after considering the supporting affidavit of Ms. Pamela Ong Siew Im, an advocate and solicitor, affirmed on even date. The applicant is a Thai national residing in Bangkok and is a widow of the late Saw Theong Hong who owned landed properties in Penang., According to Ms. Ong her firm has been solicitors for the applicant and her family in respect of their affairs in Penang and her eldest son, Bill Saw, who is personally known to Ms. Ong looks after the family interest in Penang. It seemed that on 12 July 1989 Ms. Ong received information that someone had impersonated the applicant with forged documents to dispose the said land and that solicitors had been appointed to act for both the purchaser and the purported vendor. She immediately telephoned Bill Saw in Bangkok who confirmed that his mother had not sold nor had instructed anyone to sell the said land. She was then instructed by Bill Saw to take necessary action to protect his mother's interest. She then tried to conduct the lawyers concerned but was unsuccessful. However, she wrote letters to the respective solicitors informing about her client's instructions in the matter. In the meantime, she instructed her legal assistant to lodge a police report at Beach Street Police Station concerning the purported fraud on the sale of the said land.

Subsequently, Ms. Ong managed to speak to Mr. Khor Keng Loon of Messrs Khor, Ong & Co., solicitors for the purported vendor, who informed her that the client had since discharged him and the purchase price of over RM1 million had been sent to another solicitor. Hence, in the circumstances and in order to prevent any further loss to the applicant, she filed an *ex parte* application praying for the relief in terms therein. Needless to say, acting on Ms. Ong's affidavit, I accordingly granted the said order until further order.

On 9 September 1989 the present respondent, Adorna Properties Sdn. Bhd. applied and was given leave to intervene in these proceedings and on 30 November 1989 I heard arguments of Counsel in respect of the present application.

Mr. John Fong Wa Tan, the respondent's managing director, affirmed an affidavit dated 9 September 1989 supporting the present application. He deposed that the respondent company became the registered proprietor of the said property on 24 May 1989 and he was advised that under s. 340 National Land Code the respondent had a good title until proven otherwise. To date, however, there had been no action taken to challenge the respondent's title, "presumably under any of the exception provided in s. 340(2). As the respondent has commenced to develop the said land, the existence of the injunction order and the registrar's caveat would prevent the company from proceeding with its development project of the said land resulting in the respondent incurring considerable loss and damage. Further, Mr. Fong deposed that para. 3 of Ms. Pamela Ong's affidavit is untrue because had she made enquiries at the Land Registry she would have discovered that the applicant was no longer the registered proprietor of the said land and that the respondent had become the registered proprietor even before the date when her *ex parte* application was filed. Secondly, he stated that Ms. Ong's affidavit was defective because what was deposed therein was purely hearsay and the source of information was never disclosed.

Encik Ghazi, (together with Encik C.C. Lim) for the respondent, in referring to Ms. Ong's affidavit submitted that Ms. Ong had failed to make a full disclosure of the material fact that the applicant has ceased to be the registered proprietor of the said land at the time when the application was filed. Counsel also submitted that the order was not only a restraining order but mandatory in nature. Hence, on the basis of Ms. Pamela Ong's affidavit, it should never be granted. However, the gravamen of Counsel's arguments are these. First, he contended that the restraining order should be set aside and the Registrar's Caveat be removed because the said order contravenes s. 29(1) of the Government Proceedings Ordinance 1956 (Act 359). This section states as follows:

> In any civil proceedings by or against the Government the Court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
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> (a) where in any proceedings against the government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the right of the parties; and
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> (b) in any proceedings against the government for the recovery of land or other property the Court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the government to the land or property or to the possession thereof.

I should perhaps dispose of this argument by saying that Encik Ghazi has misread the operating sentence of this section i.e. "In any civil proceedings by or against the Government ..." It is settled in the present proceedings that neither the Government nor the Registrar of Titles, Penang is ever made a party in the proceedings.

Secondly, Counsel contended that the application by the applicant was misconceived because the Registrar of Titles, Penang, was never made a party to the originating summons and that being the position he was not before this Court when the order directing him to enter the Registrar's Caveat on the said land was made by the Court. Further, the Court could not order the registrar to register the said Registrar's Caveat because under s. 320(1) National Land Code, the registrar's function is quasi-judicial in nature which means that he could

only act upon information available to him before exercising his discretion. In the instant case, as the Registrar is not a party to the proceedings, he was not possessed of any or sufficient information when registering the said Registrar's Caveat. Encik Ghazi relied on the speech of Lord Diplock (delivering the judgment of the Privy Council) in *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44 which states:

> Under these section the Registrar's functions in relation to registrar's caveats are not exclusively ministerial as they are in relation to the other kinds of caveats. They require the exercise of a discretion that is quasi-judicial in its nature. The prohibitory consequences resulting from the entry of a registrar's caveat impose what may be very damaging restrictions upon the private rights of the proprietor of the land. The registrar is not entitled to impose them unless they appear to him to be necessary or desirable for one or more of those purposes which upon the true construction of the section are specified in para. (a) or (b) of s. 320(1) or necessary or desirable to counteract such documentary error as is mentioned in para. (c).
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> In determining whether or not to exercise the power conferred upon him by the section, the registrar can only act upon such information as is available to him. This will consist of what is entered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by whoever has requested him to exercise his power to enter a registrar's caveat.

In reply, Encik Gerard Chan, Counsel for the applicant submitted that the Registrar of Titles was merely directed by the Court to register the Registrar's Caveat. Counsel relied on *Seet Soh Ngoh v. Venkateswara Sdn. Bhd. & Anor.* [1976] 1 MLJ 242 which held that the Court has power to direct the Registrar to enter the Registrar's Caveat. In that case, Chang Min Tat J held that where the Registrar was before the Court on an allied matter he could be ordered to enter his caveat in circumstances where the *status quo* of title to land should be preserved pending the determination of the dispute by the Court.

On the question whether the registrar is required to be made a party or be before the Court first before the said order is good, Counsel relied on the decision of Wong Kim Fatt JC in *AR. PL. Palaniappa Chettiar v. PL. AR. Letchumanan Chettiar & Anor.* [1972] 1 MLJ 232 who held that the High Court has power under s. 417 of the Code to order the Registrar to enter a Registrar's Caveat to prevent fraud or improper dealings in land whether or not the Registrar is a party to the proceedings.

Finally Encik Chan submitted that bearing in mind the situation and the circumstances of the matter faced by Ms. Pamela Ong the proper remedy available in order to prevent fraud or improper dealing of the said land and to protect the interest of the applicant was to apply for an entry of the Registrar's Caveat on the said land until the determination of the dispute. In this respect, Counsel informed me that the applicant has filed a writ and a statement of claim against the defendant for a declaration concerning the purported transfer of the said land to the defendant. Hence, to protect the *status quo* the present Registrar's Caveat should remain until the disposal of the civil suit.

My approach to the respondent's application will be from two standpoints. First to consider whether the *ex parte* injunction (which the respondent contended to be mandatory in nature) and the Registrar's Caveat was properly made and secondly whether in the present circumstances of the matter, the Registrar's Caveat should remain until the final determination of the dispute between parties regarding the said land. In considering these points, the crucial question is whether or not this Court has the power to direct the Registrar to enter the Registrar's Caveat on the said land under s. 320(1) National Land Code.

Having appraised the matter and after considering the submissions of Counsel and the law, I am satisfied that the *ex parte* order was properly made. Admittedly, I relied entirely on the affidavit of Ms. Pamela Ong and no doubt on further scrutiny of Mr. John Fong's affidavit, I find she had failed to make enquiries at the Land Registry regarding the ownership of the said land. I also appreciated the fact that the application was filed before the issue of any writ by which the dispute over the ownership of the said land was to be begun. In this regard, it has, however, been drawn to my attention that the writ was filed by the applicant on 13 September 1989 *vide* civil suit no. 22-401-89 seeking declarations in respect of the said land. Be that as it may, I am satisfied that the *ex parte* application was one of great urgency and any further delay by her solicitors in filing the said application would have caused the applicant great hardship and would entail irreparable damage to her on account of an alleged fraud committed or improper dealing concerning the transfer of the said land to the respondent. Above all, I am satisfied that Ms. Pamela Ong had affirmed the affidavit in utmost good faith and the fact that she had omitted to make proper enquiries at the Land Registry regarding the ownership of the said land cannot invalidate her affidavit and does not outweigh the urgency of the application. On the question whether or not the said order, which is in the nature of interlocutory mandatory injunction, should have been granted, I rely on the decision of Hoffmann J. in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 WLR 670, who held that in considering whether to grant an interlocutory mandatory injunction a Court was primarily concerned not with whether the injunction was mandatory or prohibitory but with whether the injustice suffered by the defendant if the injunction was granted and the plaintiff later failed at trial was greater than the injustice to the plaintiff if the injunction was not granted and he later succeeded at trial. Upon the facts and the circumstances before me, I find the risk of injustice of the applicant is greater because without the said order and if the applicant were to succeed at the trial she would not be able to get back the said land and would suffer a greater loss which would be difficult to quantify. Thus, on the balance of convenience, the said order was properly made.

I next proceed to consider the crucial question whether the Registrar's Caveat was properly ordered. It must first be conceded that the Registrar of Titles, Penang was never a party to this originating summons. Thus, going by the submission of Encik Ghazi, the order directing the Registrar to enter the Registrar's Caveat could only be made if he was a party to the proceedings or at least where "the Registrar was before the Court on an allied matter" (*Seet Soh Ngoh v. Venkateswara Sdn. Bhd., supra*). In fact in Seet Soh Ngoh the plaintiff joined in the Registrar of Titles as a 2nd defendant. In my opinion, notwithstanding the Registrar of Titles is not a party to this application, the Court has power to order the registrar to enter the Registrar's Caveat under s. 417(1) of the Code which reads as follows:

> The Court or a Judge may be order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.

Encik Chan referred me to the decision of Wong Kim Fatt, JC in *AR. PL. Palaniappa Chettiar's* case (*supra*) where it was held that the High Court has the power under s. 417(1) to order the Registrar to enter the Registrar's Caveat under s. 320 to prevent fraud or improper dealing whether or not the Registrar is a party to the proceedings. Having considered the reasoned judgment of the learned Judicial Commissioner, I need only say that I am in complete agreement with his decision and adopt the same in this present application. However, what I need to emphasize here is simply that s. 417 empowers the Court to direct by order the registrar to do all such things as may be necessary to give effect to the Court's order or

judgment which included ordering the registrar to enter his Registrar Caveat under s. 320. In the instant case, after a proper scrutiny of the subsequent affidavits of Mr. Bill Saw (Lampiran 11) and the applicant (Lampiran 12) and the writ and the statement of claim, I am satisfied that in the circumstances of the whole case the Registrar's Caveat is necessary to be entered to prevent fraud or improper dealing in respect of the said land and should remain until the final determination of the dispute in civil suit no. 22-401-89.

In the circumstances, the respondent's application must therefore be dismissed with costs which shall be costs in the cause.

Also found at [1990] 2 CLJ 973